

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 17Apr2002

Case No. 2001-BLA-657

In the Matter of
HERMAN CALDWELL,
Claimant,

v.

CYPRUS KANAWHA CORPORATION,
Employer,
and
CYPRUS AMAX MINERALS COMPANY/RAG,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-interest.

APPEARANCES:

Edmond Collett, Esq.
Hyden, Kentucky
For the Claimant

Martin Hall, Esq.
Lexington, KY
For the Employer

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, (hereinafter referred to as “the Act”) and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.¹

On April 12, 2001, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers’ Compensation Programs (OWCP), for a hearing. (DX 30)² A formal hearing on this matter was conducted on September 5, 2001, in Benham, Kentucky, by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call witnesses, to examine and to cross-examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES

The issues in this case are:

1. Whether the Claimant has pneumoconiosis as defined by the Act and regulations;
2. Whether Claimant’s pneumoconiosis arose out of coal mine employment;
3. Whether Claimant is totally disabled; and,
4. Whether Claimant’s disability is due to pneumoconiosis.

(DX 30, Tr. 8-9).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

¹ The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² In this Decision, “DX” refers to the Director’s Exhibits, “EX” refers to the Employer’s Exhibits, “CX” refers to Claimant’s Exhibits and “Tr.” refers to the official transcript of this proceeding.

FINDINGS OF FACT

Procedural History:

On May 12, 2000, Herman Caldwell, the “Claimant”, filed a claim for black lung benefits. (DX 1). On August 28, 2000, the Office of Workers’ Compensation Programs (OWCP) denied the claim for benefits finding Claimant had not proven any of the elements of entitlement. (DX 12). Claimant requested a hearing on September 7, 2000. (DX 13). An informal conference was held on November 8, 2000 at London, KY. The District Director’s August 28, 2000 denial was affirmed on February 5, 2001. (DX 29). Claimant requested a formal hearing on February 8, 2001 and the case was referred to the Office of Administrative Law Judges on April 12, 2001. (DX 30). A formal hearing was held before the undersigned Administrative Law Judge in Benham, KY on September 5, 2001. All parties were afforded the opportunity to call witnesses, to examine and to cross-examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

Background:

Mr. Caldwell was born on October 13, 1946 and was 54 years old at the time of the hearing. (Tr. 14). He completed the ninth grade. (DX 1). Claimant was married on two previous occasions, but both marriages ended in divorce. (DX 19). Mr. Caldwell has no dependents for purposes of augmentation. (DX 1).

Mr. Caldwell stated he worked in coal mine employment for twenty-six years. (DX 1). He stated that he quit coal mine employment in 1996 when he became disabled from a stroke. During his coal mine employment he worked mainly as a truck driver and heavy equipment operator. (DX 3). Claimant’s last coal mine employment was performing surface mining, running a dozer and a dump truck. He was exposed to rock and coal dust. (Tr. 13-14). Mr. Caldwell currently complains of coughing, sometimes producing phlegm, wheezing and getting short winded upon exertion. (Tr. 20-21). However, he does not currently receive any treatment for his breathing complaints. (Tr. 23).

Smoking History

Mr. Caldwell testified that he was a non-smoker. (Tr. 20). Further, all of the physicians who examined Claimant concurred that he did not smoke. I find there is no conflicting evidence on this issue and make a finding that Mr. Caldwell is a non-smoker.

Responsible Operator

Cyprus Kanawha Corp. is the employer with whom Mr. Caldwell spent his last cumulative one year period of coal mine employment and is properly designated as the responsible operator in this case. (§ 725.493 (a)(1); DX 5).

Length of Coal Mine Employment:

Claimant alleges 26 years of working in and around the coal mines. (DX 19). The parties stipulated Claimant has 23 years of coal mine employment. (Tr. 8). Based upon my review of the record, I accept this stipulation as accurate and credit Mr. Caldwell with 23 years of coal mine employment.

MEDICAL EVIDENCE

Chest X-rays:

X-ray Date	Exhibit Number	Physician	Qualifications	Reading
6/10/96	DX 21	Hudgens		normal
6/24/96	DX 21	Tucker		normal
6/5/00	DX 10	Baker	"B" reader ³	0/1, p,p
6/5/00	DX 11	Sargent	"B" reader/BCR ⁴	No parenchymal or pleural abnormalities consistent with pneumoconiosis
11/29/00	DX 23	Dahhan	"B" reader	No parenchymal or pleural abnormalities consistent with pneumoconiosis
11/29/00	DX 25	Jarboe	"B" reader	negative
11/29/00	DX 26	Wiot	"B" reader	negative
11/29/00	DX 27	Spitz	"B" reader	negative

³ A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.51) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

⁴ Board-certified radiologist.

11/29/00	DX 28	Shipley	"B" reader	No parenchymal or pleural abnormalities consistent with pneumoconiosis
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Pulmonary Function Tests:

<u>Exhibit/ Date</u>	<u>Physician</u>	<u>Age/ Height</u>	<u>FEV₁</u>	<u>FVC</u>	<u>MVV</u>	<u>FEV₁/ FVC</u>	<u>Comments/ Qualifying</u>
DX 21 6/1/93	McLaughlin	46 67 ⁵	2.88	3.86	103	75%	Tracings-Yes No
DX 21 8/26/97	Young	50 67"	3.29	4.09	101	80%	Tracings-Yes No Comments: Exercise test not performed due to heart problems
DX 7 6/5/00	Baker	53 67 1/2"	3.02	4.05	81	75%	Tracings-Yes No Comments: Fair Comprehension/ Cooperation
DX 23 11/29/00	Dahhan	54 68"	3.00	3.52	63	85%	Tracings-Yes No Comments: Good Comprehension/ Cooperation

Arterial Blood Gas Studies:

Test Date	Exhibit Number	pCO₂	pO₂	Qualifies
6/10/96	DX 21	42.7	77	No ⁶
6/5/00	DX 9	37	76	No
11/29/00	DX 23	35.3	78.3	No

⁵ I must resolve the height discrepancy on the pulmonary function tests. Protopappas v. Director, OWCP,

6 B.L.R. 1-221 (1983). As 67" is the height that is most often reported. I find Mr. Caldwell is 67" in height.

⁶ Test conducted during hospitalization at East Tennessee Baptist Hospital.

Medical Opinions:

Mr. Caldwell was admitted to the Baptist Hospital of East Tennessee on June 6, 1996 for numbness of his right arm and hand. Diagnoses of cerebral vascular accident (stroke), hypertension, gout, and hypertriglyceridemia were listed. Claimant was discharged on June 16, 1996 and was transferred to Knoxville, Tennessee for further evaluation. (DX 21).

The record also contains hospital records from Plateau Medical Center, which includes lab results and physical therapy records and progress notes dated from June 17, 1996 through September 10, 1996. These records pertain to Mr. Caldwell's stroke and physical rehabilitation for that diagnosis. (DX 21).

In addition, the record also consists of medical records from the Med-Surg Group dated from November 30, 1990 through June 18, 1997. These records are for a variety of conditions including hypertension, allergies, stroke, night sweats, depression, anxiety, and a history of alcohol abuse. These records make no mention of pneumoconiosis or any lung disease. (DX 21).

Claimant was examined by Dr. Glen Baker, who qualifications are unknown, on June 5, 2000. Dr. Baker noted Claimant had 26 years of coal mine employment on the surface. The physician noted Mr. Caldwell had suffered a stroke in June 1996 and was partially paralyzed on his right side. Dr. Baker also noted Claimant had no smoking history. At the time of the examination, Mr. Caldwell had complaints of wheezing, sputum production, dyspnea, coughing and orthopnea and had those symptoms for the six years prior to the examination. Claimant was taking medication for high blood pressure at that time. Dr. Baker diagnosed Mr. Caldwell with cardiopulmonary diagnoses of chronic bronchitis and hypoxemia and indicated that these diagnoses are caused by coal dust exposure. Further, Dr. Baker opined that Claimant has minimal impairment with decreased PO₂ values and chronic bronchitis. However, the physician also opined that Claimant does not have an occupational lung disease that is caused by coal mine employment. He further indicated that Mr. Caldwell does not have a pulmonary impairment and that Claimant retains the respiratory capacity to perform his work of a coal miner or comparable work in a dust free environment. (DX 8).

On October 4, 2000, Dr. Dinar Sayani examined Claimant. Dr. Sayani indicated he mainly saw Mr. Caldwell for a follow up on his blood pressure. The physician noted hypertension, hyperlipidemia, and a history of cerebrovascular accident as impressions related to Mr. Caldwell. The physician noted Claimant's chest was clear. Dr. Sayani did not mention pneumoconiosis or any lung related disease. (DX 24).

Mr. Caldwell was examined by Dr. A. Dahhan, a board certified internist and pulmonologist, on November 29, 2000. The physician noted 23 years of coal mine employment, all of which was outside, which ended in 1996 with a stroke. Dr. Dahhan indicated that Mr. Caldwell

was a non-smoker with a history of cough, dyspnea upon exertion, hypertension, gout, hyperlipidemia, and stroke. The physician noted good air entry to both lungs upon examination. Further, the physician reviewed the medical evidence of record and opined that there was insufficient objective data to justify a diagnosis of coal workers' pneumoconiosis. Further, he found no objective findings to indicate any pulmonary impairment. From a respiratory standpoint, the physician opined Mr. Caldwell retains the physiological capacity to continue his previous coal mine employment. Dr. Dahhan found no evidence of pulmonary impairment or disability caused by coal dust exposure. Claimant suffers from hypertension, hyperlipidemia, and cerebral vascular accident (stroke), all of which are conditions of the general public, according to the physician. Dr. Dahhan did indicate that as a total man, Mr. Caldwell does not retain the capacity to continue his previous coal mine employment due to Claimant's hypertension and previous stroke. (DX 23).

Dr. Thomas Jarboe, a board certified medical examiner and internist, reviewed Mr. Caldwell's medical records and submitted a report based on those records on June 3, 2001. Based upon his review of the Claimant's records, Dr. Jarboe opined within a reasonable degree of medical probability and certainty, that there is not sufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis. The physician based his opinion on the absence of a positive reading of pneumoconiosis on chest x-ray. Further, Dr. Jarboe indicated that all of Claimant's spirometric studies produced normal results. In this physician's opinion, Mr. Caldwell neither has any respiratory impairment, nor is he totally and permanently disabled from a respiratory standpoint. Dr. Jarboe opined that Claimant retains the respiratory capacity to do his last coal mine job or one of similar demand in a dust free environment. However, the physician stated that as a whole man, Mr. Caldwell could not return to his job as a truck driver or heavy equipment operator due to his cerebral accident and his residual weakness. Dr. Jarboe opined that a cerebral accident is not related to the inhalation of coal dust or the presence of coal workers' pneumoconiosis, but is a disease of the general population. (EX 1, 2).

Dr. Gregory Fino, who is board certified in internal medicine and pulmonary diseases, also reviewed Mr. Caldwell's medical records and issued a report based on those records on August 2, 2001. Dr. Fino concluded that Mr. Caldwell does not suffer from an occupationally acquired pulmonary condition as a result of coal dust exposure. The physician opined that there is no respiratory impairment present. Further, he indicated that Claimant was not totally or partially disabled and he retains the respiratory capacity to return to his last mining job or a job requiring similar effort. Dr. Fino's conclusions are based upon the negative chest x-rays, normal lung volumes, the normal results of the spirometric evaluations, and normal exercise oxygenation. (EX 2).

DISCUSSION

Applicable Law:

As Mr. Caldwell's claim was made after March 31, 1980, the effective date of Part 718, his claim must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* §§ 718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore*, 9 B.L.R. 1-4, 1-5 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-212 (1985). Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26, 1-27 (1987).

The Benefits Review Board has held that the law of the circuit in which the Claimant's last coal mine employment occurred is controlling. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989). The Claimant's last coal mine employment took place in West Virginia, which falls under the Fourth Circuit's jurisdiction.

Pneumoconiosis:

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Pneumoconiosis is defined by the regulations:

For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.

(1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) *Legal Pneumoconiosis*. “Legal pneumoconiosis” includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

Section 718.201(a).

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence.

The record consists of nine interpretations of four x-rays. Although Dr. Baker interpreted the June 5, 2000 x-ray as 0/1 for pneumoconiosis, a reading which is less than 1/0 does not constitute affirmative evidence of pneumoconiosis. Therefore, there are no positive interpretations for pneumoconiosis. Further, four of the negative interpretations were by physicians who are both B-readers and Board-certified radiologists. I find that the x-ray evidence weighs against the existence of pneumoconiosis. All of the x-ray films were negative for pneumoconiosis. Even Dr. Baker’s reading of 0/1 for pneumoconiosis is considered negative for the existence of pneumoconiosis. Consequently, I find that the x-ray evidence fails to establish the existence of pneumoconiosis under § 718.202(a)(1).

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. That method is not available in the instant case because this record contains no biopsy evidence.

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis; § 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor’s claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in §

718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

This section requires a weighing of all relevant medical evidence to ascertain whether or not Claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

Five physicians issued medical opinions on Mr. Caldwell's physical condition. (DX 8, 23, 24; EX 1, 2). Dr. Sayani makes no mention of pneumoconiosis, but stated that Mr. Caldwell's chest is clear. (DX 24). The record also contains hospital and medical center records. (DX 21). The hospital and medical center records are silent as to the existence of pneumoconiosis or any coal dust related disease. At first, Dr. Baker opined that Claimant has cardiopulmonary diagnoses that are caused by coal dust exposure. Yet, Dr. Baker also opined on the Department of Labor questionnaire that Mr. Caldwell does not have an occupational lung caused by coal dust exposure.

I give less weight to Dr. Baker's opinion because I find that his opinion is not well reasoned or documented. An unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) (en banc). See also *Mabe v. Bishop Coal Co.*, 9 B.L.R.1-67 (1986) (a report which is internally inconsistent and inadequately reasoned may be entitled to little probative value). Dr. Baker's opinion is internally inconsistent due to the fact that he stated on one hand that Mr. Caldwell suffers from cardiopulmonary diseases caused by coal dust exposure, but on the other hand stated that Mr. Caldwell does not suffer from any occupational lung disease caused by coal mine employment.

Conversely, I find the opinions of Drs. Dahhan, Jarboe and Fino are well-reasoned and well-documented. Dr. Dahhan physically examined the Claimant as well as reviewed the medical evidence of record. Drs. Jarboe and Fino both reviewed all the medical evidence of record and based their opinions on the objective spirometric test results, physical examination and their review of the records.

In conclusion, I find that the medical opinions of record fail to show that Claimant had pneumoconiosis by a preponderance of the evidence. Therefore, Mr. Caldwell has failed to produce sufficient evidence to prove that he has pneumoconiosis pursuant to §§ 718.202 (a)(1)-(4).

Total Disability:

Assuming *arguendo* that Mr. Caldwell has established the existence of pneumoconiosis, he is nonetheless ineligible for benefits. The evidence fails to establish that Mr. Caldwell is totally disabled due to pneumoconiosis. Neither the pulmonary function tests, nor arterial blood gas studies produced qualifying scores. Moreover, all of the physicians opined that Mr. Caldwell has the respiratory capacity to return to his coal mine employment. Therefore, even if Mr. Caldwell had established that he suffered from pneumoconiosis, his recovery would be precluded by the fact that he does not suffer from a disabling respiratory impairment.

Entitlement:

As Mr. Caldwell has failed to prove that he suffers from pneumoconiosis arising out of coal mine employment. Therefore, Mr. Caldwell is not entitled to benefits under the Act.

Attorney's Fees:

The award of an attorney's fee under the Act is permitted only in cases in which the Claimant is found to be entitled to the receipt of benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any attorney's fee to the Claimant for legal services rendered in pursuit of benefits.

ORDER

It is therefore ORDERED that the claim of Herman Caldwell for benefits under the Act is hereby DENIED.

A

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601. **A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2605, 200 Constitution Avenue, NW, Washington, D.C. 20210.**